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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1222

GARY AIRCRAFT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 22a–25a) is reported at 368 F. 2d 223. The findings of fact, conclusions of law and order of the Board (Pet. 1a–2a, 3a–19a) are reported at 151 NLRB 7.

JURISDICTION

The judgment of the court of appeals was rendered on November 8, 1966 (Pet. 26a); the decree was entered on November 30, 1966 (Pet. 27a); and a petition for rehearing was denied on January 4, 1967 (Pet. 28a). The petition for a writ of certiorari was filed on April 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that two individuals were supervisors within the meaning of Section 2(11) of the National Labor Relations Act.

2. Whether the Board improperly relied on hearsay testimony in finding that petitioner interfered with its employees' Section 7 rights and discharged one of them for engaging in union activities, in violation of Section 8(a) (1) and (3) of the Act.

STATUTE INVOLVED

Section 2(11) of the National Labor Relations Act, as amended (61 Stat. 137, 138, 29 U.S.C. 152(11)), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The other pertinent provisions of the Act are set forth in the Appendix to the petition (Pet. 29a–32a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. SUPERVISORY STATUS OF CREW LEADERS PHILLIPS AND COLEMAN

Petitioner maintains a plant in Victoria, Texas, where it engages in the overhauling of aircraft for the United States Air Force (Pet. 5a; J.A. 88, 133).[1]

[1] "J.A." refers to the Joint Appendix in the court below.

In March 1964, about 60 of petitioner's 250 production and maintenance employees worked the day shift in the tank sealing department (Pet. 6a; J.A. 167, 181–182). They were divided into six crews of varying numbers. Four crews worked in the hangar and two in the warehouse located about one block from the hangar (Pet. 6a; J.A. 181–182). Each crew was headed up by a "crew leader" or "leadman" (Pet. 6a; J.A. 21, 132, 181). The entire shift was under the general supervision of Foreman Jack McCool, who had his office and spent 80 percent of his time in the hangar. There was no supervisory position between McCool and the day-shift employees, except the crew leaders (Pet. 6a; J.A. 184–185).

McCool generally described each day's job schedule to the crew leaders. They, in turn, made specific assignments of the work involved to the employees in their crews, directed them to proceed from one task to another, and had responsibility for getting the jobs done (Pet. 7a–8a; J.A. 26, 43, 48–50, 62–63, 109–110, 121–124, 161–162).[2] The crew leaders were also responsible for maintaining work sheets, showing the time consumed on particular jobs, and "squawk books," indicating flaws found by the inspection department (Pet. 7a; J.A. 108, 127–128, 134–135).

Although McCool had ultimate authority to hire, transfer and discharge employees, the crew leaders effectively recommended such actions to him (Pet.

[2] Crew leaders attended general production meetings with the department foremen and the plant production superintendent; no other employees attended such meetings (J.A. 115–116, 126–127).

7a–9a). Thus, Crew Leader Lambert recommended the transfer of one of his crew members and the discharge of another, and both actions were taken upon Foreman McCool's summary approval (J.A. 111–114). Similar recommendations were made by Crew Leaders Phillips and Coleman and approved by McCool (see *infra*, pp. 5, 6). And, when a 22-man layoff took place on March 9, 1964, McCool and the crew leaders discussed and made the choices together (J.A. 169–170). On occasion, crew leaders also effectively recommended employee raises to McCool (J.A. 38, 160, 180).

Crew leaders wore white shirts and khaki pants, while their crew members wore brown shirts and regular work clothes (Pet. 7a, n.2; J.A. 64). Sometimes the crew leaders performed manual labor in demonstrating the proper way to do a job, checking the work of their crew, or assisting in a "tight spot", but such matters occupied only a small part of their average day (Pet. 7a; J.A. 26, 108, 119, 160–161). The hourly pay of the crew leaders was substantially higher than that of all but the most experienced crew members (Pet. 6a; J.A. 30–32, 105–107, 159–160).

2. PETITIONER'S INTERFERENCE WITH, AND DISCRIMINATION BASED ON, UNION ACTIVITIES

Lodovico Freier was employed by petitioner on September 2, 1963 (J.A. 61). A few months later, the Union (International Association of Machinists, AFL–CIO) commenced organizational activity among petitioner's employees (Pet. 5a; J.A. 12, 71–72). In January 1964,[3] Freier signed a union authorization

[3] All subsequent dates are in 1964.

card and began "talking union" to other employees (J.A. 73–75).

On Friday, February 28, Crew Leader Wickham's crew, of which Freier was a member, was disbanded. Wickham, Freier, and one other employee requested Crew Leader Coleman to transfer them to his crew (Pet. 10a; J.A. 148, 168). Coleman, who needed only one more crew member, selected Freier because Freier had "ability to work" and "could work circles around" Wickham (Pet. 10a; J.A. 138, 149–150). Coleman told McCool he wanted Freier on his crew and the latter approved the transfer. At the time, both Coleman and McCool knew that Freier had just received a warning slip about his job performance (Pet. 1a; J.A. 66–67, 138–139, 179). A few days later, two members of Coleman's crew complained to him that Freier was asking them to attend union meetings. On his own initiative, Coleman assembled his crew and told them to stop talking about the Union on Company time (Pet. 10a–11a; J.A. 147, 154–156, 165–167).

On March 9, petitioner decided to lay off 25 employees in McCool's department as part of a larger reduction in the total work force; 22 were to be laid off immediately and three more when certain work in progress had been completed. Later that day, after a discussion between McCool and the crew leaders, four employees in Coleman's crew and 18 in other crews were laid off. Freier was neither mentioned nor laid off, even though he had worked on Coleman's crew for a shorter time than the four employees who were chosen (Pet. 5a, 11a; J.A. 139, 151, 158, 169–172).

That night, about 14 of petitioner's employees attended a union meeting, including Freier, Thomas Beerwart and J. W. McKelvain (who also worked in McCool's department). At the meeting, Freier and McKelvain signed up as in-plant organizers. On the following day, the Union notified petitioner that it was conducting an organizing drive and that Freier and McKelvain were on the organizing committee. McKelvain left petitioner's employ on March 12 (Pet. 5a, 10a; J.A. 1–4, 12–16, 46, 72–73, 97, 172).

On the morning of March 13, Thomas Beerwart was told by his crew leader, Andy Phillips, that he was going to be fired. When Beerwart asked for the reason, Phillips replied that McCool had said Beerwart was a "union agitator". Phillips added that he had told McCool this was not true (Pet. 9a; J.A. 45–46, 51–52). Later, Phillips told Thomas Beerwart's father, Albert, in the presence of two other employees, that McCool had ordered the discharge of Thomas. When Albert asked if this was because of his son's "union activities," Phillips nodded his head affirmatively. However, shortly thereafter, Phillips reported that he had talked to McCool and that another employee had been chosen for layoff instead of Beerwart (Pet. 9a; J.A. 29–30, 44, 55–59).

After lunch that same day, Crew Leader Coleman informed Freier that he was "going to have to let [him] go." When Freier asked why, Coleman replied that he had less seniority on the crew than the other crew members and less experience. Coleman also handed Freier a slip stating that Freier's termination was "initiated by" Coleman and was based on sub-

standard work "for period of time employed" (Pet. 11a; J.A. 80, 83–84, 153).[4] When Freier challenged these reasons, Coleman indicated that he was unwilling to discuss the matter and that it would be "easier" for Coleman if Freier "just left right now". Later, Freier returned for his tool box and asked Coleman if his participation in the Union had anything to do with his discharge. Coleman refused to answer (Pet. 11a; J.A. 80a–82a). About a week later, however, employee (subsequently Crew Leader) Lambert asked Coleman why he had discharged Freier, and Coleman answered that McCool had heard Freier "talking union" and had said that Freier "was going to have to go" (Pet. 11a; J.A. 117–118).

B. THE DECISIONS OF THE BOARD AND COURT OF APPEALS

Upon the foregoing facts, the Board found that Crew Leaders Phillips and Coleman were "supervisors" within the meaning of Section 2(11) of the Act (Pet. 8a–9a). The Board also found that the statements made by Phillips, indicating that Beerwart had been selected for discharge because of his union activities, interfered with the employees in the exercise of their Section 7 organizational rights, in violation of Section 8(a)(1) of the Act (Pet. 9a–10a). Finally, the Board found that petitioner had discharged Freier because he had engaged in union activities, in violation of Section 8(a) (1) and (3) of

[4] As noted *supra*, p. 5, Coleman had wanted Freier on his crew because of Freier's ability to work, and on March 9, four employees with more crew seniority than Freier had been laid off. Moreover, Freier had considerably more plant seniority than other members of Coleman's crew (J.A. 150).

the Act (Pet. 13a–16a). The Board's order requires petitioner to cease and desist from the unfair labor practices found, to reinstate Freier with back pay, and to post appropriate notices (Pet. 17a–19a).

The court of appeals held that the Board's findings were supported by "substantial evidence on the record as a whole" and, accordingly, enforced the Board's order in full (Pet. 22a–25a).

ARGUMENT

1. Petitioner's contention (Pet. 9–12) that the Board erred in concluding that Crew Leaders Phillips and Coleman were "supervisors" within the meaning of Section 2(11) of the Act (*supra*, p. 2) merely raises a "substantial evidence" question. Thus, the holding of the court below on this question does not warrant further review. See *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502–503. In any event, the facts summarized in the Statement (pp. 2–4) amply support the Board's conclusion. As the Board found (Pet. 8a–9a), and the court below agreed (Pet. 23a–24a), these individuals exercised independent judgment, rather than routine responsibility, in directing work by employees; they were authorized to make, and did make, effective recommendations for the transfer and discharge of employees; and were identified as representatives of management in the eyes of the employees.[5]

[5] See *Jas. E. Matthews & Co.* v. *National Labor Relations Board*, 354 F. 2d 432, 434–435 (C.A. 8), certiorari denied, 384 U.S. 1002; *Keener Rubber, Inc.* v. *National Labor Relations Board*, 326 F. 2d 968, 969 (C.A. 6), certiorari denied, 377 U.S. 934; *National Labor Relations Board* v. *Schill Steel Products, Inc.*,

2. If the Board's findings as to the supervisory status of Phillips and Coleman be accepted, there is no substance to petitioner's further contention (Pet. 12–18) that the Board improperly relied on hearsay testimony. As the court below held (Pet. 24a), Phillips himself spoke with "the voice of management" when he told employees that Foreman McCool said Beerwart had been selected for discharge because of his union activities (*supra*, p. 6); hence, the testimony proving Phillips' statement was direct evidence of unlawful interference and coercion by petitioner, rather than hearsay.[6] That testimony was as to an event perceived by the witnesses, Phillips speaking the words; there was no need to prove the truth of the words spoken, either by Phillips or reputedly by McCool, for the mere showing *that* they were spoken by an agent of petitioner establishes restraint of employees in the exercise of their organizational rights. See *National Labor Relations Board* v. *G. W. Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 860 (C.A. 9).

Similarly, since Coleman was a representative of petitioner and concededly an active participant in Freier's discharge (Pet. 7–8), his statement that McCool said Freier had "to go" because he was "talking union" (*supra*, p. 7) amounted to an adop-

340 F. 2d 568, 571–572 (C.A. 5). As these cases hold, an employee who possesses any one of the powers listed in Section 2(11) of the Act (*supra*, p. 2) qualifies as a "supervisor". All of the cases relied upon by petitioner (Pet. 9–12) to show that the crew leaders lacked supervisory authority are plainly distinguishable on their particular facts.

[6] Phillips' statement was proved by the uncontradicted testimony of three employees to whom it was made (Pet. 9a).

tion of that statement as his own and, hence constituted an admission attributable to petitioner; accordingly, the testimony proving Coleman's statement[7] was competent evidence of petitioner's unlawful motive. See *National Labor Relations Board* v. *Ferguson,* 257 F. 2d 88, 90, 92 (C.A. 5); *National Labor Relations Board* v. *Chautauqua Hardware Corp.,* 192 F. 2d 492, 494 (C.A. 2); *National Labor Relations Board* v. *Gardner Construction Co.,* 296 F. 2d 146, 148 (C.A. 10); *National Labor Relations Board* v. *Globe Products Corp.,* 322 F. 2d 694, 696 (C.A. 4); *National Labor Relations Board* v. *Ewell Engineering & Contracting Co.,* 315 F. 2d 375 (C.A. 5).[8]

In any event, the Board is not bound by strict rules of evidence under Section 10(b) of the Act (29 U.S.C. 160(b)) and Section 7(c) of the Administrative Procedure Act (5 U.S.C. (1964 ed.) 1006(c), now 5 U.S.C. 556(d)), and the testimony at issue was properly admitted as relevant and material. See *National Labor Relations Board* v. *Mastro Plastics Corp.,* 354 F. 2d 170, 179 (C.A. 2), certiorari denied, 384 U.S. 972; *National Labor Relations Board* v. *Imparato Stevedoring Corp.,* 250 F. 2d 297, 302–302 (C.A. 3); *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 690–691

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[7] Coleman's statement was proved by the testimony of Crew Leader Lambert, to whom it was made (Pet. 11a).

[8] *General Tire of Miami Beach, Inc.* v. *National Labor Relations Board,* 332 F. 2d 58 (C.A. 5), cited by petitioner (Pet. 13), is distinguishable, since there, unlike here, the statement relied upon by the Board to show unlawful motivation was not made by a supervisor who played an active part in the discharge. And, in *Pittsburgh S.S. Co.* v. *National Labor Relations Board,* 180 F. 2d 731 (C.A. 6) (Pet. 15), the statements attributing an unlawful motive to the employer were not made by supervisory personnel.

(C.A. 9), certiorari denied, 338 U.S. 860. Furthermore, contrary to petitioner's suggestion (Pet. 14), the Board also relied on numerous other facts in finding that Freier was laid off for engaging in union activities—*e.g.*, that "on the heels of formal notification from the Union that an organizing drive was underway and that Freier was on the Union's committee, [petitioner] discharged Freier and simultaneously informed Thomas Beerwart that he also had been selected for discharge because McCool considered him a union agitator" (Pet. 14a); and that Coleman's alleged reasons for discharging Freier were inconsistent with Coleman's selection of Freier to work on his crew and the retention of Freier despite the March 9 layoff (Pet. 14a–15a). Thus, the conclusion reached by the Board as to the motive for discharging Freier is amply supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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